

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK JONES,

Plaintiff,

v.

CASE NO. 10-CV-11604

HON. GEORGE CARAM STEEH

THOMAS PARLING,
LINDA BUCKHOLZ, and
JASON THOMAS,

Defendants.

_____/

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION (#39) AND DENYING PARTIES'
MOTIONS FOR SUMMARY JUDGMENT (#27 and 34)

Plaintiff Mark Jones, a prisoner currently in the custody of the Michigan Department of Corrections, alleges that defendants violated his constitutional rights by fabricating misconduct reports and security classification documents in order to increase plaintiff's custody level. Plaintiff claims these actions were taken in retaliation for plaintiff's attempt to seek a pardon or commutation of sentence from the Michigan Parole Board. After the June 14, 2010 order of this court, only this retaliation-based § 1983 claim against the three individual defendants remains. On September 20, 2010, defendants filed a motion for summary judgment, arguing: (1) plaintiff failed to exhaust his administrative remedies prior to filing his claim; (2) defendants are protected by qualified immunity; and (3) the court should decline to exercise supplemental jurisdiction over plaintiff's state law claims. Plaintiff filed a response to defendants' motion on October 20, 2010 arguing he exhausted his administrative remedies. On November 2,

2010, the court ordered defendants to file a supplemental brief regarding the issue of exhaustion and to include the Grievance Inquiry Screen displaying all Step III Grievance Appeals filed by plaintiff and all Grievances pursued by plaintiff through Step III of the MDOC Grievance Process. Defendants failed to file a supplemental brief. On November 29, 2010, plaintiff filed a motion for summary judgment.

On January 14, 2011, Magistrate Judge Morgan issued a report and recommendation that the court deny defendants' motion for summary judgment and deny plaintiff's motion for summary judgment. As defendants failed to provide evidence regarding plaintiff's grievances, even after ordered to do so, Magistrate Judge Morgan recommends denying defendants' motion as to the failure to exhaust administrative remedies argument. Magistrate Judge Morgan recommends denying defendants' motion as to the qualified immunity argument because defendants fail to establish the absence of a genuine issue of material fact; defendants provided the most cursory argument and did not provide any evidentiary support for it. As to the supplemental jurisdiction argument, Magistrate Judge Morgan notes that the state law based conspiracy claim was dismissed in this court's June 14, 2010 order. Moreover, defendants' argument assumes plaintiff has no remaining federal claim but plaintiff has a federal claim. Magistrate Judge Morgan recommends denying plaintiff's motion for summary judgment as plaintiff did not establish that there is no genuine issue of material fact on his claim of retaliation for the exercise of a constitutional right. Plaintiff merely repeated the allegations of his complaint.

Plaintiff filed his objection on January 27, 2011. In his objection, plaintiff argues that Magistrate Judge Morgan erred in not granting his motion to compel discovery. He

argues he needed the discovery to establish an element of his retaliation claim. However, plaintiff did not raise this issue in his motion for summary judgment and he did not file an objection to Magistrate Judge Morgan's November 2, 2010 order denying his motions for discovery and motion to compel discovery. Plaintiff also makes an argument regarding his state law conspiracy claim. However, as noted by Magistrate Judge Morgan, this claim was dismissed pursuant to the court's June 14, 2010 order. Finally, plaintiff seems to suggest he should receive summary judgment because defendants failed to file a supplemental brief on the exhaustion issue as required to do so by the November 2, 2010 order. However, the consequence of defendants' failure to file a supplemental brief with evidence of the grievance process is the denial of defendants' motion for summary judgment. Such a failure does not result in summary judgment for plaintiff as plaintiff has not established his claim. The court finds Magistrate Judge Morgan's report and recommendation is well-reasoned and the court adopts it in its entirety.

For the reasons stated above, the court hereby ACCEPTS and ADOPTS the magistrate's report and recommendation as its findings and conclusions in this matter. Defendants' motion for summary judgment is DENIED and plaintiff's motion for summary judgment is DENIED.

SO ORDERED.

S/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

Dated: February 7, 2011

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record on February 7, 2011, by electronic and/or ordinary mail and also to Mark Jones #22308 at Oaks Correctional Facility, 1500 Caberfae Hwy., Manistee, MI 49660.

S/Josephine Chaffee
Secretary/Deputy Clerk